86-708

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BRON BURWELL, M.D.,

Petitioner,

vs.

NATIONAL TRANSPORTATION SAFETY BOARD, and DONALD D. ENGEN, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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10 3 PP

QUESTIONS PRESENTED

I. WHETHER, IN CIRCUMSTANCES IN WHICH THE NATIONAL TRANSPORTATION SAFETY BOARD DOES NOT FIND THE PILOT UNQUALIFIED TO FLY NOR IN NEED OF PUNISHMENT OR REHABILITATION, THE BOARD IS EMPOWERED UNDER SECTION 609 OF THE FEDERAL AVIATION ACT TO SUSPEND A PILOT'S AIRMAN CERTIFICATE AS A SANCTION SOLELY FOR ITS DETERRENT EFFECT ON OTHER PILOTS.

II. WHETHER THE ORDER OF SUSPENSION IMPOSED SOLELY FOR DETERRENT EFFECT IS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION IN CIRCUMSTANCES IN WHICH THE AIRMAN IS FOUND TO BE FULLY REHABILITATED AND THE VIOLATION IS FOUND TO BE INADVERTENT AND THE RESULT OF HARMLESS MISJUDGMENT.

LIST OF PARTIES

The names of all parties to this action are included in the caption.

TABLE OF CONTENTS

PAGE

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below 2

Jurisdiction 3

Statutes and Regulations Involved . . 3

Statement of the Case 11

Reasons for Granting the Writ 19

Conclusion 28

Appendices

A. Memorandum Judgment of the United States Court of Appeals for the District of Columbia Circuit A-1

TABLE OF CONTENTS continued

PAGE

Appendices continued

B. National Transportation Safety Board Order No. EA-2143 . . . . . B-1

C. Initial Decision of Administrative Law Judge William E. Fowler C-1

D. Administrator, FAA Order of Suspension D-1

E. Petition for Reconsideration and Rehearing E-1

F. Order of the United States Court of Appeals for the District of Columbia Circuit denying Rehearing F-1

G. FAA letter to Burwell dated January 27, 1983 . . . . . G-1

H. Burwell letter of February 2, 1983 to FAA . . . H-1

Certificate of Service Cert-1

Affidavit of Mailing Aff-1

TABLE OF AUTHORITIES

PAGE

Hard v. C.A.B., 248 F.2d 761 (7th Cir. 1957), cert. denied, 355 U.S. 960 (1958) 20

Pangburn v. C.A.B., 311 F.2d 349 (1st Cir. 1962) 20

Wilson v. C.A.B., 244 F.2d 773 (D.C. Cir. 1957), cert. denied, 355 U.S. 870 (1952) 20

NTSB Order EA-2343, David S. Komjathy, July 14, 1986 20

STATUTES AND REGULATIONS

PAGE

5 U.S.C. §706 3

49 U.S.C. §1429 . . . . . 5, 25

49 U.S.C. §1486 [Section 609] . . 3, 7, 19

14 C.F.R. §61.3(e) 10, 14, 15, 17

14 C.F.R. §91.9 . . . . . 10, 15, 17

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Bron Burwell, M.D., petitioner herein, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 10, 1986.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the order of the National Transportation Safety Board was filed as a memorandum of June 10, 1986 (Appendix A) and is not reported. The order of the National Transportation Safety Board imposing a suspension of petitioner's pilot license was served on March 27, 1985 as NTSB Order No. EA-2143 (Appendix B). The initial decision of Administrative Law Judge William E. Fowler finding that although violations of sections 61.3(e) and 91.9 of the Federal Aviation Regulations had ocurred, no suspension of petitioner's pilot certificate should be imposed was issued July 11, 1984 (Appendix C). The Administrator's Order of Suspension was filed March 20, 1984 (Appendix D).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was filed on June 10, 1986. A timely petition for reconsideration and rehearing (Appendix E) was denied on August 8, 1986 (Appendix F). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), 28 U.S.C. §2101(c) and 49 U.S.C. §1486(f).

STATUTES AND REGULATIONS INVOLVED

The following statutes are involved:

5 U.S.C. §706

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

. . . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations,

the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 U.S.C. §1429

§1429. Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation may, from time to time, . . . reexamine any civil airman. If, as a result of any such . . . reexamination, or if, as a result of any other investigation made by the Secretary of Transportation, he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation may issue an order . . . suspending, or revoking, in

whole or in part, any . . . airman certificate. . . . Prior to . . . suspending, or revoking any of the foregoing certificates, the Secretary of Transportation shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be . . . suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation under this section may appeal the Secretary of Transportation's order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's order if it finds that safety

in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation. . . . The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Secretary of Transportation shall be made a party to such proceedings.

49 U.S.C. §1486

§1486. Judicial review

(a) Orders subject to review; petition for review.

Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter . . . shall

be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

. . . .

(d) Power of court

Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation. . . .

(e) Conclusiveness of findings of fact; objections

The findings of facts by the Board or Secretary of Transportation if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) Review by Supreme Court

The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Secretary of Transportation shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

The following regulations are involved:

14 C.F.R. §61.3(e)

(e) Instrument rating. No person may act as pilot in command of a civil aircraft under instrument flight rules, or in weather conditions less than the minimums prescribed for VFR flight unless--

(1) In the case of an airplane, he holds an instrument rating or an airline transport pilot certificate with an airplane category rating on it;

14 C.F.R. §91.9

§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

STATEMENT OF THE CASE

Bron Burwell, M.D., utilized her private pilot's license and her own aircraft to fly to numerous small hospitals in the Appalachian Region to perform duty as an emergency room doctor. On the evening of December 31, 1982, she was alone, flying from Tri-Cities Airport, Tennessee, to Roanoke, Virginia. At the time, her pilot ratings permitted such night flight but required she remain in visual flight conditions (VFR). A weather briefing obtained just before departure, indicated that the route and the destination were under cloud cover but were VFR and forecast to remain so.

Enroute to Roanoke, she flew at the altitude last assigned by air traffic control and followed the lights of the

towns and highways below. Suddenly and unexpectedly, the aircraft entered clouds which were not visible in the darkness. Since she was not authorized to fly in such instrument conditions and had lost all visual outside references, she followed the routine procedure of turning back 180 degrees in order to return to visual conditions.

However, the aircraft did not immediately reach clear air. With concern for the nearby mountains now hidden by clouds, Burwell decided to climb to an altitude above the highest terrain. Once above the clouds, she tried unsuccessfully to make radio contact with any control facility, or to find a break in the cloud cover large enough for a visual descent. Finally communication was established with the Richmond air traffic control facility. With

their assistance, Burwell was cleared to descend under radar surveillance through the clouds to clear air beneath, and an uneventful landing was accomplished at Richmond.

By phone and letter, FAA Inspectors questioned Burwell, stating it appeared she did not familiarize herself with all available weather information before beginning the flight and expressing criticism of her actions once she encountered the clouds (Appendix G).

Responding to the FAA's request for a statement, Burwell readily admitted the flight in the clouds and explained that the unavailability of weather reporting stations between Tri-Cities and Roanoke and the darkness led to her inadvertent entry into the clouds. She defended her

decision to climb above the clouds, pointing out that when faced with concern for the suddenly hidden mountains, she had merely followed the standard emergency procedure of climbing and immediately seeking assistance. The letter was treated by the FAA as an admission to the violation of FAR 61.3 (flight in weather conditions less than the minimums prescribed for VFR when not rated as an instrument pilot), although the inadvertent aspect of the cloud encounter was clearly set forth. At the trial on this matter, the Burwell letter dated 2/2/83, became Administrator's Exhibit AE-1 (Appendix H).

Over a year after the flight, the Administrator served an Order on March 20, 1984, imposing a 180-day suspension of Burwell's pilot certificate for violation

of FAR 61.3 and FAR 91.9 (operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another) (Appendix D). Burwell appealed the order to the NTSB, and trial before the chief administrative law judge was held on July 11, 1984.

During the period between the incident and the trial, Burwell had made extraordinary progress in her pilot skills, and had undergone a thorough and intensive program of rehabilitation. She had acquired a newer aircraft fully equipped for instrument flight, and had obtained her pilot instrument rating on an accelerated basis. She had purchased portable and home computer systems and had subscribed to a private weather service providing complete weather information by telephone. Burwell complete a mountain flying training course, partici-

pated in the FAA "Wings" program and attended three FAA seminars on pilot techniques. She acquired 300 additional hours pilot experience between the incident and the trial.

The evidence disclosed that no other aircraft had been endangered and that no re-routing of any air traffic had been required. The Administrator's expert witness, a pilot of 38 years and 11,000 hours experience, although extremely critical of novice pilot Burwell's decision to begin the flight under the existing conditions, failed to inform the court that the FAA weather briefer had omitted important advisory information, recommending VFR flight not be attempted due to the likelihood of low lying clouds obscuring the mountain tops. The court was misinformed by the FAA expert who testified that the

weather briefer had no responsibility to provide such information, whereas in truth, the FAA procedures manual established precisely such a duty. Neither Burwell nor her then counsel were aware of this FAA internal directive and did not challenge the expert's veracity. The issue was first raised in the Circuit Court.

The law judge, faced with the pilot's admission and the opinion of the FAA expert that the operation was careless, found that Burwell had violated both FAR 61.3 and 91.9 as charged. However, the law judge refused to impose any sanction. He described the pilot as one who has done more to rehabilitate herself than any pilot he has ever had in any case before him. The judge expresse his awareness of the FAA's program for air safety but seriously questioned what would be accomplished by an Order of Suspension.

BEST AVAIL

He doubted that a sanction would produce a deterrent effect on Burwell. Because of the facts and circumstances, Burwell's rehabilitation, attitude and outlook, and her need to travel long distances several times a week in her medical vocation, he also expressed doubt that by failing to impose a sanction in this case, an example would be set encouraging other pilots to expect to commit similar violations with impunity (Appendix C).

An appeal to the NTSB was made by the Administrator. Although no record evidence was brought forth in support of the Administrator's assumption, the Board accepted the argument that a suspension of the airman certificate was needed in order to deter other pilots. The Board rejected the decision of its chief law judge and imposed a 30-day suspension of Burwell's pilot certificate (Appendix B).

ABLE COPY

Under 49 U.S.C. §1486(a), Burwell appealed the Board's order to the Court of Appeals for the District of Columbia Circuit. The court summarily affirmed the Board's decision (Appendix A). A petition for rehearing (Appendix E), in which the jurisdiction issue was raised for the first time was denied (Appendix F).

REASONS FOR GRANTING THE WRIT

I. This Petition Does Not Involve Complex Issues Of Statutory Authority.

It will assist the court to first know what this is not.

This is not an argument that under Section 609 of the Federal Aviation Act, the Administrator must first find a lack of competency or qualification before imposing

a disciplinary suspension. Wilson v. C.A.B., 244 F.2d 773 (D.C. Cir. 1957), cert. denied, 355 U.S. 870 (1952); Hard v. C.A.B., 248 F.2d 761 (7th Cir. 1957), cert. denied, 355 U.S. 960 (1958); and Pangburn v. C.A.B., 311 F.2d 349 (1st Cir. 1962) are three well known cases that have tried that argument and failed. As recently as July 14, 1986, the argument has been rejected, this time in NTSB Order No. EA-2343, David S. Komjathy, Respondent.

In like respect, this is not an argument that Section 901 of the Act (civil penalty) must be employed in a case of FAR violations without a concurrent finding of lack of skill.

Finally, Petitioner does not ask for a review of factual determinations.

II. The Circuit Court Has Approved The Ultra Vires Imposition Of Absolute Liability.

The circuit court, by accepting in total the Board's explanation for the sanction has endorsed a policy that all violations must incur a sanction, if not to punish or rehabilitate the offender, to serve as a deterrent to others. This is tantamount to absolute liability and exceeds the Administrator's authority.

Common sense alone will show the injustice and unfairness of such a policy. In petitoner's case, the following summary makes this clear:

1) Petitioner was qualified to undertake the flight. The decision to make the flight was considered by the FAA as poor judgment by Burwell, but not in itself a violation.

2) The underlying violation, the entry into clouds, was unintentional and inadvertent. This was never questioned by the FAA.

3) The law judge was unrestrained in his praise for Burwell's rehabilitation and self-improvement and found her case to be one-of-a-kind, for which a sanction would punish and because of the facts and circumstances, would have questionable or no deterrent effect on Burwell or others.

4) The Administrator, without taking exception to any of the above, appealed, and argued in his appeal brief that even though a suspension would have no disciplinary or punitive impact on Burwell, a suspension was necessary as a deterrent to other pilots.

5) The Board, while citing the rationale of their law judge for not imposing a

sanction, nevertheless agreed with the Administrator that precedent and the deterrent factor required a "minimal" 30-day suspension. Public interest and safety in air commerce were referenced with no explanation how grounding this medical doctor would serve the public other than as some deterrent on other pilots (Appendix B).

6) The Circuit Court, while fully cognizant of all the mitigating factors, summarily dismissed Burwell's argument that the decision of the Board was arbitrary and capricious and unsupported by substantial evidence on the record. And while at no time at any stage of the proceeding had there been any suggestion of crime or wrongdoing, the Circuit Court saw fit to make reference to "criminal prosecutions" when the court virtually censured petitioner for her argument that deter-

rence does not always follow sanction (Appendix A).

7) Nowhere in the federal aviation regulations is there a requirement that every violation will be met with a sanction. The Circuit Court has affirmed Board action imposing absolute liability.

III. Petitioner Is Not Alone.

There are over 500,000 active certificated pilots in the United States. Every one of them is subject to the same unreasoning treatment accorded Burwell. Granting certiorari will by no means assure fairness and reason will follow in other pilot enforcement actions, but it will demonstrate that the Supreme Court expects the lower courts to give consideration to the right of each pilot to receive such fundamentals of justice.

IV. An Exercise Of The Court's Supervisory Powers Is Called For.

In the earlier cases of sanctions which have been challenged by pilots, the appellate court's reluctance to disturb the NTSB order has been centered about Section 609 (49 U.S.C. §1429(a)) and its footing on "air safety". In Burwell, the Board referred to public interest and safety in air commerce in justification of its order. Clearly, air safety is everyone's goal.

This does not mean, however, that review of administrative decisions must forego all considerations of reason and justice.

Pilot Burwell, as is common of other pilots in this type of situation, was unprepared for the adversary role the FAA

enforcement branch immediately assumed upon learning of the incident. There was no warning, no alerting that full and frank discussion of the facts would lead to an order suspending her airman certificate for six months for an inadvertent violation in which no harm or damage resulted. The initial letter to Burwell invited a statement which would be "given consideration" (Appendix G). The reply letter from Burwell is typical of the response from a pilot accustomed to trusting dependence upon the FAA (Appendix H). Up until that time the FAA had served as a friendly supporter, supervising the training, ensuring the safety and reliability of the aircraft she operated, encouraging her to seek higher levels of piloting skill and added pilot certificate ratings. There was no reason to suspect that sud-

denly this "friend" would become a fierce adversary, determined to punish whether in Burwell's interest or not.

Nevertheless, this is the administrative system as established by statute.

But, the statutes also provide a check and balance in the form of judicial review. An abuse of discretion, such as has taken place in Burwell, can be set aside. However, it would appear from the disparaging tone of the Circuit Court's memorandum, that the court has virtually taken Burwell to task for making the challenge. The court rejected her objections finding all to be "meritless". Under the facts of this case, this is shocking and is a total departure from any careful and accurate consideration of the circumstances.

This court has the last opportunity to correct this injustice.

V. Conclusion.

This is an exceptional situation.

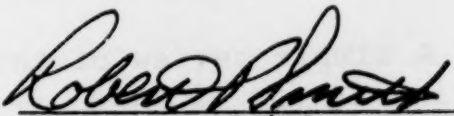
A simple review of the circumstances will show the absence of reason and justice in the Circuit Court's ruling. While Burwell represents but one pilot, her right to fair treatment compels the same consideration as though 1,000 pilots' petitions lay before the court. Possibly there would be a great number but for the prohibitive cost of seeking judicial review.

Whether one or 1,000 the fact remains that the imposition of a sanction is both an abuse of the Administrator's discretion under the Act, and a failure of the Court's responsibility to set aside such unlawful exercise of power.

WHEREFORE, Petitioner respectfully requests that her petition for writ of

certiorari be granted.

DATED this 8th day of October, 1986.



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NOT TO BE PUBLISHED-SEE LOCAL RULE 8(f)
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1310 Filed June 10, 1986

BRON BURWELL, M.D.,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD and DONALD D. ENGEN, Administrator, Federal Aviation Administration,

Respondents.

Petition for Review of An Order of the National Transportation Safety Board

Before WALD, Circuit Judge, and WRIGHT and McGOWAN, Senior Circuit Judges.

JUDGMENT

This cause came on to be heard on a petition for review of an order of the National Transporation Safety Board and was briefed and argued by counsel. The court has fully considered the issues presented; they occasion no need for a published opinion. See D.C. Cir.R. 13(c).

For the reasons stated in the accompanying memorandum,

It is ORDERED AND ADJUDGED by this court that the order of the National Transportation Safety Board sought to be reviewed herein is hereby affirmed.

It is FURTHER ORDERED by this court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir.R. 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

George A. Fisher
Clerk

No. 85-1310 - Burwell v. NTSB

MEMORANDUM

In this case petitioner Bron Burwell, a private pilot, challenges a decision of the National Transportation Safety Board (NTSB) suspending her pilot's license for 30 days as a penalty for her violations of Federal Aviation Administration (FAA) regulations. She argues that the Board acted arbitrarily and without evidentiary support in rejecting the decision of the Administrative Law Judge and in imposing a penalty. Because we find her objections to the Board's actions to be meritless, we affirm.

Petitioner is a doctor who practices medicine at various rural hospitals. She uses her pilot's license to fly between the hospitals where she works. At the time of the incident involved in this case she

had had her pilot's license for less than six months and was certified to fly under the FAA "visual flight rules" (VFR). Such a certification means that the pilot may only fly in clear weather and may not fly in clouds. See generally 14 C.F.R. §§ 91.105-91.109 (1985).

On December 31, 1982 Burwell took off from the Tri-City Regional Airport in Tennessee, intending to fly to Roanoke, Virginia. She had checked with various flight service stations before leaving to determine whether the weather would accommodate her plans. The forecast informed her that there were clouds above Roanoke. Believing that she would be able to fly below the clouds to Roanoke, however, she left the Tri-City Airport and headed toward Virginia.

As she crossed into Virginia, and climbed over the mountains located there, she flew into a cloud bank. Recognizing that she was not qualified to fly under such conditions, she made a 180-degree turn in an attempt to fly out of the clouds. When the attempt was unsuccessful, she climbed to 5,500 feet, above the clouds, and radioed for help. With the assistance of the Richmond air traffic controllers, she ultimately landed safely in Richmond.

On March 20, 1983, after an investigation of the incident, the FAA suspended petitioner's pilot's license on the ground that she had violated FAA regulations, 14 C.F.R. §§ 61.3(e), 91.9 (1985), by flying in "instrument conditions" with only a VFR rating. Joint Appendix (JA) at 1 (Order of Suspension). Petitioner appealed that

order and was provided a hearing before an Administrative Law Judge. The ALJ found that petitioner had violated the regulations cited by the FAA. He noted, however, that petitioner had during the interim period obtained her "instrument rating," purchased a new, advanced airplane, purchased advance weather forecasting equipment, attended a mountain flight course, accumulated hours of additional flight time, and attended several FAA seminars. Further, he noted that she had been particularly helpful and forthcoming in response to the investigation of the incident and had no prior record of violations. The ALJ thus concluded that although petitioner had violated the FAA regulations, no penalty should be imposed.

The Administrator of the FAA appealed that decision to the NTSB. The Board

affirmed the ALJ's finding of a violation, but imposed a 30-day license suspension. In the Board's view, this "minimal" sanction was necessary to deter others from violating the FAA rules in question. JA at 174.

Petitioner challenges the Board's decision on several grounds. She first argues that the Board's decision to impose a 30-day license suspension was arbitrary and capricious and unsupported by substantial evidence on the record. The thrust of her argument is that there is no record evidence in this case supporting the Board's assumption that imposition of a penalty will deter others from violating the FAA rules. She argues that because she has taken steps to improve her piloting abilities, imposition of a penalty will have the exact opposite effect of deterring others from taking similar steps.

As an initial matter, it is far from clear that the agency has to develop a record in each adjudication as to the effect that a penalty would have on others. Simply put, the basic assumption underlying all enforcement actions--and indeed all criminal prosecutions--is that imposition of a penalty will serve not only to punish and rehabilitate the wrongdoer, but also to deter others from committing similar violations. No evidence needs to be submitted to buttress this assumption. Moreover, it would appear that the Board <u>did</u> consider the steps taken by petitioner in evaluating whether to impose a suspension in this case. The Board clearly could have imposed a much larger penalty but, in consideration of the mitigating factors, chose merely to impose a light 30-day suspension.

Nor are we persuaded by petitioner's attempts to distinguish Administrator v. Sidicane, 3 NTSB 2447 (1980). In that case an inexperienced pilot, licensed for VFR-only flight, similarly flew into a bank of clouds and had to be be guided to the ground with the assistance of radar. Moreover, the pilot involved in that case upgraded his license after the incident, not only receiving an instruments rating, but receiving an instructor level rating. Nontheless, the Board imposed a 30-day license suspension.

Although Sidicane was less forthcoming when he was in the air than was Burwell and appears to have been a less credible witness on the stand, the facts of his violation are nontheless quite similar to the case at bar. We agree with the Board that Sidicane is helpful in evaluating the

appropriateness of the sanction imposed in this case.

Next, petitioner argues that the Board's decision to penalize her is arbitrary and capricious because she could have avoided the penalty by reporting the violation under the Aviation Safety Reporting Program (ASRP). See 44 Fed.Reg. 18128 (March 26, 1979). Under the provisions of that program, a pilot who violates the FAA rules may report the violation to the National Aeronautics and Space Administration (NASA). NASA then deletes identifying information from the report and passes it on to the FAA. The pilot is immunized from any sanction. The purpose of the program is to encourage reporting of violations of FAA rules that would not otherwise be known to the agency.

In our view the Board did not err in refusing to consider the effect of the ASRP. Petitioner's interpretation of the plan appears to be both inconsistent with the agency's interpretation and contrary to common sense. According to the FAA, see 44 Fed. Reg. at 18129, the program was not intended to allow reporters to escape enforcement action for violations known to the FAA. See id. ("when a violation of the Federal Aviation Regulations comes to the attention of the FAA from a source other than a report filed with NASA under the Aviation Safety Reporting Program, appropriate action will be taken based on facts and information which are obtained from sources other than a report filed with NASA."). Moreover, such a scheme would hardly serve the purposes of the program--to encourage disclosure of viola-

tions unknown to the FAA. Indeed, it would defeat the enforceability of any of the FAA rules by allowing violators to so easily escape punishment. Moreover, petitioner does not deny that she did not file any report under the plan. Thus, even if the plan were applicable to this case, petitioner simply failed to invoke the protections of the plan.

Finally, petitioner argues that the Board erred in finding that she had violated the FAA rules. Because petitioner failed to file a cross-appeal from the ALJ's finding of a violation of the FAA rules and did not present a challenge to the violation to the Board, however, we find that this argument is not properly before us. The Act provides that "[n]o objection to an order of the Board * * * shall be considered by the court unless

such objection shall have been urged before the Board * * * or, if it was not so urged, unless there were reasonable grounds for failure to do so." 49 U.S.C. App. § 1486(e) (1982). Thus, it is wholly inappropriate for her to raise this challenge for the first time in this court.*

Because we conclude that none of petitioner's arguments have merit, we affirm the Board's decision imposing a 30-day suspension of her license.

---

* We do not reach the issue whether the Board erred in relying upon certain misstatements by one of the agency experts because we conclude that the Board's findings of a violation is not properly before the court. Similarly, we decline to reach the issue whether the FAA controller should have known, when he or she assigned an altitude to petitioner, that she would be unable to maintain VFR conditions.

SERVED: March 27, 1985
NTSB Order No. EA-2143

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D.C. on the 26th day of February, 1985.

Donald D. Engen, Adminstrator, FEDERAL AVIATION ADMINISTRATION,	)	
Complainant,	)	Docket
vs.	)	SE-6235
BRON BURWELL, M.D.,	)	
Respondent.	)	

OPINION AND ORDER

The Administrator has appealed from the initial decision of Administrative Law William E. Fowler, issued orally at the conclusion of the hearing held in this proceeding on July 11, 1984. 1/ The law judge found that respondent, on December 31, 1982, acted as pilot-in-command of a

1/ An excerpt from the hearing transcript containing the initial decision is attached

Cessna 172, N-4682D, on a flight from Tri-City, Tennessee to Richmond, Virginia under visual flight rules (VFR); that during the course of this flight, respondent operated the aircraft in weather conditions less than the minimum prescribed for VFR flight; and that respondent, who did not then posssess an instrument rating, violated sections tions 61.3(e)2/ and 91.9 3/ of the Federal

2/ Section 61.3(e) reads, in pertinent, as follows:

§61.3 Requirement for certificates, rating, and authorizations.

* * * * *

(e) Instrument rating. No person may act as pilot in command of a civil aircraft under instrument flight rules, or in weather conditions less than the minimums prescribed for VFR flight unless-

(1) In the case of an airplane, he holds an instrument rating or an airline transport pilot certificate with an airplane category rating on it.

3/ Section 91.9 reads as follows:

§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Aviation Regulations (FAR). The law judge found further that, in view of the particular facts and circumstances surrounding this case, 4/ no suspension of respondent's private pilot certificates should be imposed. 5/

The Administrator, in his appeal brief, argues that the law judge erred in holding that a sanction should not be imposed despite his finding that respondent violated sections 61.3 and 91.9, and that, while several mitigating factors justify a reduction in the length of the suspension, a 30-day suspension is warranted.

Respondent has filed a reply brief opposing the appeal and urging that the law judge's decision be affirmed since,

4/ The law judge's rationale for not imposing a sanction is discussed below.

5/ The Administrator's order provided for a 180-day suspension.

under the circumstances, no useful purpose would be served by the imposition of a suspension.

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified to provide for a 30-day suspension of respondent's airman certificate.

Although the regulatory violations themselves are not at issue on appeal, a brief summary of the incident is appropriate at least to the extent that the circumstances surrounding the flight bear on the issue of sanction. On the day in question, respondent ultimately was traveling to Richmond, but on departure from Tri City planned to fly only to Roanoke where she

planned to board a commercial flight to Richmond. She was following the lights on Interstate 81, through a valley, when she suddenly entered clouds. She did a 180 degree turn and subsequently climbed to an altitude above the clouds. She testified that she did not want to return to Tri City because of the mountainous terrain, that she could not contact Roanoke, and that the first frequency she picked up was Richmond, where she eventually landed after being vectored down through the cloud layer.

An FAA operations inspector testified that, based on the weather information available at the time of the flight, respondent should not have taken off because, as a non-instrument rated private pilot, she should have realized she would not be able to maintain VFR through the mountains

between Tri City and Roanoke;6/ that when encountering clouds, respondent should have climbed immediately; and that she should have returned to Tri City, where she knew the weather was good, rather than continuing east toward deteriorating weather.

The law judge, while finding in effect that the violations were established, concluded that a sanction was not necessary because respondent "is completely and thoroughly rehabilitated as a pilot" (Tr. 138). The law judge was impressed by the following: (1) respondent recognized that

6/ The inspector pointed out that, based on the ceiling forecast for Roanoke and the elevation of the surrounding terrain, the clouds would be within 700 to 800 feet of the ground through the pass, which is below VFR minimums. In addition, the area forecasts for Virginia called for mountain or higher terrain to be obscured. The inspector stated that "it would be particularly hazardous to even attempt to go through there at night" (Tr. 37).

she exercised poor judgment in connection with the flight; (2) she has obtained an instrument rating, taken a mountain flying course, completed the wings program, and attended several FAA seminars; and (3) she has purchased a computer which she utilizes for weather briefings. Finally, the law judge cited as an additional mitigating factor respondent's use of an aircraft in the frequent travel required by her medical practice.

After carefully examining the circumstances of this case, we are not persuaded that the factors cited by the law judge totally obviate the need of a sanction. The precedent most directly in point is Administrator v. Sidicane, NTSB Order EA-1402, Marc h28, 1980. The respondent there, like the instant one, was a private pilot, without an instrument rating, who

encountered adverse weather on a VFR flight and who eventually was vectored down through a cloud layer to a landing. Subsequent to the incident, respondent Sidicane obtained a commercial pilot certificate with single and multi-engine land, instrument, flight instructor and instrument flight instructor ratings. Also, by the time of the hearing, he had begun to earn his living as a flight instructor. The Board, noting the changed circumstances, particularly in regard to the ratings held and the economic impact of the sanction, reduced the 90-day suspension (ordered by the law judge) to a 30-day suspension.

In view of the above precedent, and the substantial similarity between the two cases, the Board concludes that a 30-day suspension likewise would be appropriate herein. Although the factors considered

by the law judge are entitled to weight in mitigation, it is our view that a minimal sanction 7/ nevertheless is in the public interest and in the interest of safety in air commerce in order to deter pilots from attempting flights into conditions which exceed their capabilities, thereby creating hazardous situations and the potential for accidents. 8/

7/ As the Board noted in Sidicane, sanctions in this type of case generally range upward from a 30 day suspension.

8/ The fact that a sanction might have been waived if respondent had filed a report with the Aviation Safety Reporting Program has no relevance to this proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The Administrator's order, as modified to provide for a 30-day suspension, is affirmed; and

3. The 30-day suspension of respondent's airman certificate shall commence 30 days after service of this order.9/

BURNETT, Chairman, GOLDMAN, Vice Chairman and BURSLEY, Member of the Board concurred in the above opinion and order.

9/ For purposes of this order, respondent must physically surrender her certificate to an appropriate representative of the FAA, pursuant to Section 61.19(f), FAR.

ENTERED: July 11, 1984
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	)	
	)	
Donald D. Engen, Adminstrator, FEDERAL AVIATION ADMINISTRATION,	)	
	)	
Complainant,	)	Case No.
vs.	)	SE-6235
	)	
BRON BURWELL, M.D.,	)	
	)	
Respondent.	)	

The Courthouse
2501 Huntington Avenue
Third Floor
Newport News, Virginia
Wednesday, July 11, 1984

Pursuant to notice, the above-entitled matter came on for hearing at 9:04 o'clock a.m.

BEFORE: WILLIAM E. FOWLER, JR.
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

MARGARET GILLIGAN, ESQUIRE
Office of the Regional Counsel
Federal Aviation Administration
Fitzgerald Federal Building
JFK International Airport
Jamaica, New York 11430

On behalf of the Respondent:

PHILIP L. AVIS, ESQUIRE
240 24th Street
Newport News, Virginia 23607

ORAL DECISION

Following notice to the parties, this matter came on for trial on July 11, 1984 in Newport News, Virginia.

The Respondent was present at all times, and was represented by Philip Avis, Esquire, of Newport News, Virginia.

The Complainant was represented by one of his Staff Counsel, Ms. Margaret Gilligan, of the Regional Counsel Office, Eastern Region, of the Federal Aviation Administration.

The parties have been afforded full opportunity to offer evidence, call, and examine, and cross-examine witnesses. In addition, the paties were afforded the

opportunity to make argument in support of their respective positions.

The Administrator has charged Respondent Burwell with two violations: first, by acting as pilot in command of an aircraft in weather conditions less than the minimums prescribed for VFR flight when the Respondent did not hold an instrument rating or an air transport pilot's certificate while she was flying in minimums that were less than those prescribed for a VFR flight, in violation of section 61.3(e) of the FAA Regulations.

The other section the Administrator has charged Respondent Burwell with violating is section 91.9, by operating an aircraft in a careless or reckless manner, so as to endanger the life or property of another.

Now, I have reviewed the testimony in this case, as well as the documentary exhibits, and I would have to find, hold, and conclude that the violations as charged by the FAA have been proven by the evidence adduced during the course of this proceeding.

Although the FAA only had the testimony of one witness, Inspector Roy Downs, he certainly, as the record would indicate, has 38 years experience as a pilot and inspector in the realm of aviation, and certainly would qualify as an expert in this regard. It was his considered opinion that the Respondent exercised poor judgment, at least twice, where this flight on December 31, 1982, from Tri-City, Tennessee to Richmond, Virginia, is concerned.

As I said at the outset, there's no difficulty here where the record is con-

cerned in establishing the violation.

But I think we do have to put everything into proper perspective. Now, by the Respondent taking off on this flight, she put herself in the predicament which is a -- quite a dire predicament for any noninstrument rated pilot -- to wit, to find herself in clouds, unable to immediately get out of the clouds during the course of this flight, and, at the same time, to know that she is, at that very moment, in a highly mountainous area. To say that this would put a noninstrument rated pilot in a degree of turmoil mentally, would be the understatement.

It is quite obvious by the documentary exhibits, by the testimony of the Respondent herself, and in addition, by the testimony of the Administrator's sole wit-

ness, Inspector Downs, that generally speaking, once finding herself in that predicament, the Respondent handled herself very well, and with the possible exception of making a 180 degree turn first before she climbed -- with that one possible exception -- the Respondent exercised very good judgment, as Inspector Downs had stated, in climbing, trying all the local area airports, to reach them by radio contact, which she was unable to do successfullyl, until she finally got to the Richmond airport. When she did get through to the Richmond airport, they, as the record indicates, successfully vectored her into the Richmond area and into a safe area.

I have heard a number of these cases of VFR rated pilots finding themselves in clouds, and of course, by doing this, they

do constitute a hazard. They constitute a hazard to themselves, to their own lives, to their aircraft, and they also constitute a hazard to other aircraft that may possibly be in the area. We have no evidence or testimony here in this proceeding today of any other aircraft being jeopardized or even being in the area, so I don't know whether there was or there wasn't. But fortunately, there was no incident, no untoward incident, as a result of the Respondent's predicament, and even more fortunately, there was no accident here, as Inspector Downs testified to. He's known of other incidents like this that ended up in an aircrash, and even the fatality of the pilot or pilots involved. Fortunately, we do not have that present here.

But what we do have present are a number of additional factors which give me

some concern.

I am as mindful, in the sense of the FAA's mission and duty, where air safety is concerned. It is of paramount concern to me. But I think this case is somewhat different, in that -- and I do not say this because of the Respondent's avocation as a medical doctor, which in itself, is somewhat different than the usual pilot-Respondent that we have -- but that is not a determining factor at all. But the concomitant offshoots of that, in the living that she earns, and the way that she earns it, and the usage of her aircraft for the furtherance of her living, I don't think can be totally obviated or ignored in this proceeding. And particularly so in view of the fact that the Respondent has done more to rehabilitate herself than any pilot that I have had in any case before

me, in the many years that I have been hearing these cases.

It is not unusual for a private pilot to subsequently obtain an instrument rating after he or she has been involved in an incident of this type. But at least to my knowledge, I have never encountered a pilot who has undergone such a thorough and intensive program of exceptional rehabilitation as Respondent Burwell has, here. She has not only obtained her instrument rating; she has engaged in and attended seminars for improved pilot briefings where weather conditions are concerned; she has gone into that assiduously, employing and utilizing all of the latest innovations and techniques where briefing is concerned; she has taken courses on the very latest flying techniques; she has attended innumerable FAA seminars.

I suppose what I am saying here, to boil it all down, to get to the real crux of the issue here, is that while she committed the two violations, as the Administrator has charged -- there is no question about that, and I will so find, hold, and conclude -- but in view of the fact that she has engaged in such an in-depth program of rehabilitation as a pilot, and has improved and bettered herself, and I am not unmindful of the FAA's constantly vigilant program for air safety, and to improve safety in our skies, I have a serious question in my mind as to what would be accomplished by the Respondent in this case serving out an Order of Suspension. I think she has shown clearly -- in fact, she has admitted on the stand -- that she is extremely mindful and cognizant of her violations, the mistakes that she made,

the poor judgment that she exercised, and in response to a question that I put to her while she was testifying, "If in hindsight she was put in the same position again that she was in on December 31, 1982, after receiving the briefing that she had received in the Tri-Cities area prior to her flight --" you may recall the Respondent said she would not have taken off; she would not take this flight again as a private pilot.

I'm saying that to say, that I think the Respondent is completely and thoroughly rehabilitated as a pilot, and not only in the sense of the matter of judgment, but as I stated earlier, she has improved herself, and this is in addition to her having obtained the instrument rating, which she has attained just seven months ago.

The National Transportation Safety Board may disagree with me. I'm sure the FAA will. But I do not see what a period of suspension -- the value it would have, as a deterrent where this particular Respondent is concerned.

I think this Respondent is as mindful of air safety as any that I've ever had appear before me in a proceeding of this type. As to the FAA's mission to maintain our safety, it has, as an example where other pilots are concerned, that they may be able to, because of this case, get off with a reduced sanction or no sanction -- I don't think that will necessarily follow, because I think the particular and peculiar facts and circumstances are most unusual in this case, not only because of the Respondent's rehabilitation, but because of her attitude and her outlook, and also her

work and her vocation, which necessitate her traveling long distances constantly, or at least several times during the course of the week, in following the pursuit of her livelihood.

I am persuaded in my own mind that, while she is guilty of the violations charged, a sanction imposed here would be certainly of no value to the Respondent. In fact it would be of a great nonvalue and disservice to the Respondent, and I would think that, taking into account the totality of the circumstances, as a very unusual case, and possibly the only one of its kind that I have ever heard, that the FAA might possibly bear this in mind in view of the ultimate result of this case -- which is, ladies and gentlemen, that I amgoing to find the Respondent has made the two violations as charged by the

Federal Aviation Administration, but I am not going to impose any sanction.

Based upon my review of the evidence, coupled with the documentary exhibits, I will make the following findings of fact and conclusions of law.

1) The Respondent, Bron Burwell, admits and it is found that she is the holder of private pilot's certificate number 41492086 without an instrument rating;

2) That it is found on or about December 31, 1982, the Respondent acted as pilot in command of a Cessna 172N-4682D, on a flight from Tri-City, Tennessee to Richmond, Virginia under visual flight rules.

3) It is found that during the course of the above-described flight, Respondent

Burwell operated the aircraft in weather conditions less than the minimum prescribed for the flight under visual flight rules.

4) It is found that by reason of the foregoing, Respondent Burwell violated the following sections of federal aviation regulations: Section 61.3(E), that by acting as pilot in command of a civil aircraft in weather conditions less than the minimums prescribed for VFR, when the Respondent did not hold an instrument rating or airline transport pilot's certificate with an airplane category rating; and Section 91.9, that by operating an aircraft in a careless manner so as to endanger the life or property of another, to wit, that of her own.

5) It is found -- this Judge finds that safety in air commerce and air trans-

portation and the public interest does require the affirmation of the Administrator's Order of Suspension of March 20, 1984, in view of the Respondent's violations of Sections 61.3(E) and Section 91.9 of the Federal Aviation Regulations. However, in view of all the particular and peculiar facts and circumstances surrounding this case, and the Respondent herself, it is my judgment that no period of suspension be imposed against the Respondent's private pilot certificate.

ORDER:

IT IS ORDERED that the Administrator's Order of Suspension dated March 20, 1984 be in the same and hereby is affirmed, however, without any sanction being imposed against the Respondent's private pilot certificate because of the aforesaid reasons stated earlier during the course of this decision.

This order is issued by WILLIAM E. FOWLER, JR., United States Administrative Law Judge.

APPEAL

Either party to this proceeding may appeal the Judge's initial oral decision.

The appellant shall file its Notice of Appeal within ten days of the Judge's oral initial decision, and must, within 40 days of the decision, file a brief in which he is to set forth his objections to the Judge's oral initial decision.

The Notice of Appeal and the brief shall be filed with the National Transportation Safety Board Docket Section, 800 Independence Avenue S.W., Washington, D.C. 20594.

March 20, 1984

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Bron Burwell, M.D.
1570 Brandon Avenue
Petersburg, VA 23803

Re: Docket No. 82EA160039

ORDER OF SUSPENSION

On May 10, 1983, you were advised by mail through a Notice of Proposed Certificate Action of the reasons why we proposed to suspend your Private Pilot Certificate.

After a consideration of all the evidence presently a part of this proceeding, including the representations made in our telephone informal conference on March 8, 1984, it has been determined that you violated the Federal Aviation Regulations hereinafter specified by reason of the following:

1. You are the holder of Private Pilot Certificate No. 414920286 without an instrument rating.

2. On or about December 31, 1982, you acted as pilot-in-command of a Cessna 172 N-46820 on a flight from Tri-City, Tennessee to Richmond, Virginia under visual flight rules.

3. During the course of the above described flight, you operated the aircraft in weather conditions less than the minimum prescribed for flight under visual flight rules.

By reason of the foregoing, you violated the following sections of the Federal Aviation Regulations:

1. Section 61.3(e) by acting as pilot-in-command of a civil aircraft in weather conditions less than the minimums prescribed for VFR when you did not hold an instrument rating or an Airline Transport Pilot Certificate with an airplane category rating.

2. Section 91.9 by operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

By reason of your violations of the Federal Aviation Regulations, the Administrator has determined that safety in air commerce and the public interest require the suspension of your Private Pilot Certificate for a period of 180 days.

NOW, THEREFORE, IT IS ORDERED, pursuant to Section 609 of the Federal Aviation Act of 1958, as amended, that your Private Pilot Certificate No. 414920286 be suspended as of April 9, 1984, and that said certificate be surrendered to the undersigned by that date. In the event you fail to so surrender said certificate to the undersigned Regional Counsel, said suspension shall

commence on April 9, 1984, and continue in force until 180 days subsequent to the actual surrender.

THOMAS C. HALLORAN
Regional Counsel, AEA-7

By_____
Margaret Gilligan
Attorney

APPEAL

You may appeal from this Order within twenty (20) days from the time of its service upon you to the National Transportation Safety Board, 800 Independence Avenue, S.W., Rm. 822, Washington, D.C. 20594. A copy of your Notice of Appeal must be furnished this office. Such appeal will stay the effectiveness of this Order.

cc: Philip L. Avis, Esq.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1310

BRON BURWELL, M.D.,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, and DONALD D. ENGEN, Administrator, FEDERAL AVIATION ADMINISTRATION,

Respondents.

PETITION FOR RECONSIDERATION AND REHEARING

COMES NOW Bron Burwell, M.D., by her counsel, and petitions the court for reconsideration of the Memorandum Order entered June 10, 1986, and for rehearing. As grounds, Petitioner shows the court that the sanction imposed by the Board and affirmed by the court is not within the subject matter jurisdiction authorized by law.

I. Preliminary Authority

The issue of subject matter jurisdiction can be raised at any point in the proceeding and may even be addressed sua sponte by the court. Mitchel v. Maurer, 55 S.Ct. 162, 293 U.S. 237 (1934); Louisville & Nashville R.R. v. Mottley, 29 S.Ct. 42, 211 U.S. 149 (1908); City of Gainesville v. Brown-Crummer Inv. Co., 48 S.Ct. 454, 277 U.S. 54 (1928); Fed. R. Civ. P. 12(h)(3).

II. Issue

The trial judge while recognizing that the violations by Burwell could support a sanction, found that under the circumstances of the case, a sanction was inappropriate. The evidence showed and the judge found that the violations were inadvertent, that Burwell did not lack competency, and that any attitudinal problems which could

benefit by a sanction had been self-corrected. Thus, safety in air commerce, vis-a-vis Burwell, is not implicated.

The Board, ignoring the findings of its chief law judge, and citing nothing but the Administrator's argument that a suspension is warranted, ignored the limits on its power and authority under the Federal Aviation Act, Section 609, and proceeded ultra vires, to impose a sanction for its effect on others.

The order of the Board, imposed solely "in order to deter [other] pilots", is beyond the jurisdiction of applicable law. This court has now erroneously sustained the Board's position.

III. Argument

The Administrator looks to the Civil Aeronautics Act of 1938, §609, 49 U.S.C.

§1429, for authority for the sanction to be imposed. If the sanction is unwarranted in law, the agency's choice can be overturned. Butz v. Glover Livestock Commission Co., 411 U.S. 182, 185-86, 93 S.Ct. 1455 (1973). If the sanction is not authorized by law, the absence of jurisdiction renders the proceedings legally void. Re Bonner, 151 U.S. 242, 14 S.Ct. 323 (1894).

The court cites two possible grounds for sustaining the Board. First, the remedial effect on Burwell. This was not implicated by the clear finding of the law judge and was not brought forward by the Board. Second, and erroneously, the court supports the Board's suggestion that punishment of Burwell will have a deterrent effect on others, and hence is in the public interest. Section 609 does not allow

the second, unless the first is determined.

Nowhere in Section 609 is there authority, under the circumstances, to punish Burwell by imposition of a sanction and thus there is a total absence of subject matter jurisdiction.

The issue of the Board's power under Section 609 was first considered by this court in Wilson v. C.A.B., 244 F.2d 773, cert denied, 355 U.S. 870 (D.C. Cir. 1957). However, Petitioner Wilson merely challenged the procedure employed, by arguing that re-examination was a condition precedent to an action under Section 609. This court, without citation to authority, rejected that argument and stated that suspension could be ordered for disciplinary purposes, without the necessity for re-examination. Wilson goes no further.

The issue was next addressed in Specht v. C.A.B., 254 F.2d 905 (8th Cir. 1958). However, in Specht it is clear that the remedial power of the Board was being directed at the mental attitude of Specht. The court stated:

> We agree with the Board the technical proficiency is not the only requirement upon which the issuance or retention of an airline transport pilot rating is conditioned. A successful applicant for or holder of such certificate should possess a demonstrated degree of judgment, unaffected by his temperament or disposition, which will enable him to consistently perform his technical skills in a manner conducive to the safety of his passenger, aircraft and crew. Implicit in the issuance of an airline transport pilot rating and certificate is the Administrator's finding that the holder thereof possesses the degree of judgment required of a pilot in command.

. . .

However, the failure to exercise due care and the unjustified violations of safety regulations, whether in anger or truculence or not, by an otherwise qualified applicant should certainly form a substantial evidentiary basis for a finding that the applicant was not qualified to hold such certificate.

. . .

We hold the Board acted well within its statutory authority in revoking petitioner's license upon its finding based on substantial evidence "* * * that respondent lacks the qualifications required of the holder of an airline transport pilot certificate in the respects indicated above, and that such lack of qualifications constitutes cause which would presently justify the Administrator in refusing to issue to respondent a like certificate, and that the order of revocation set forth below is required in the interest of the public in the proper discharge of the Board's statutory duty to assure the highest degree of safety in air transportation."

254 F.2d 916,17.

It should be noted that all that was suspended by the Board was Specht's Airline Transport Pilot Certificate. Retention of his Commercial Pilot Certificate permitted him to continue to fly as co-pilot and earn his living. Specht goes no further than supporting a suspension when the remedial effect is directed at the pilot respondent.

Burwell clearly does not fall into this category.

Similarly, in Pangburn v. C.A.B., 311 F.2d 349 (1st Cir. 1962), the issue of the scope of authority under Section 609 was raised. Again, as in Wilson and Specht upon which Pangburn relies, the authority of the Board to suspend a license was directed at the effect it would have directly on the pilot/petitioner.

Once again, such is not the case with Burwell.

In all these cases, including Hard v. C.A.B., 248 F.2d 761, cert denied, 355 U.S. 960 (7th Cir. 1957), also cited in Pangburn, the Board and the court were dealing with airline captains charged with the safety of their passengers. Pilots, who by their decision-making, as opposed to their technical competence, placed those passengers in jeopardy.

In each of these cases, the effect that the suspension would have on other pilots was merely ancillary. Suspensions were imposed and upheld for the remedial effect on the pilot/petitioner. None of these cases support the imposition of a suspension on a pilot who does not need remediation but solely for the effect it will have on others.

IV. Conclusion

At every stage of these proceedings, Bron Burwell has been found technically qualified and totally rehabilitated in her own right.

The only basis the Board or the court have found for imposing any penalty on Burwell is the remedial effect it will have on others.

Section 609 does not confer such authority on the Administrator, the Board, or the court, and there are no decisions that allow the Administrator to arrogate unto itself such power.

The sanction upheld by the court is without subject matter jurisdiction.

DATED this 24th day of July, 1986.

Respectfully submitted,

Robert P. Smith
601 Broadway, Suite 400
Denver, Colorado 80203
Telephone: 303/292-3880
Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1310 September Term 1985

Filed August 8, 1986

Bron Burwell, M.D.

v.

National Transportation Safety Board

BEFORE: Wald, Chief Judge; Wright and McGowan, Senior Circuit Judges

ORDER

Upon consideration of petitioner's petition for reconsideration and rehearing, filed July 25, 1986, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

BY THE COURT:
GEORGE A. FISHER, CLERK

By: Robert A. Bonner
Chief Deputy Clerk

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

GENERAL AVIATION DISTRICT OFFICE
BYRD INTERNATIONAL AIRPORT
SANDSTON, VIRGINIA 23150-2594

January 27, 1983

In Reply
Refer To: AEA-GADO-16:LDB

FILE NUMBER: 82EA160039

CERTIFIED MAIL - RETURN RECEIPT
REQUESTED

Bronwen L. Burwell
1570 Brandon Avenue
Petersburg, Va. 23805

Dear Ms. Burwell:

Personnel of this office are investigating an incident occurring on December 31, 1982 which involved the operation of a Cessna 172 aircraft, N-4682D, on top of an overcast in the Richmond, Virginia area. Richmond Approach Control vectored the aircraft down through the overcast to a point where VFR conditions

prevailed and a safe landing was accomplished.

You have been identified as pilot-in-command of N-4682D on this flight. During a recent phone conversation with Inspector Bohnke, you stated you departed the Tri-City Tennessee Airport on a VFR flight with an intended destination of Roanoke, Virginia. Prior to reaching Roanoke, you said the weather deteriorated and you climbed through the clouds to on top and proceeded to Roanoke and then on to Richmond. Weather information at the time of your briefing at Tri-City Airport indicates the weather in the Roanoke area was 2,500 feet broken to overcast, with an area forecast showing the mountains obscured in Virginia.

Tri-City weather was 25,000 thin, scattered and 15 miles at the time of your briefing.

From the above information, it appears that you did not familiarize yourself with all available weather information before beginning the flight. Then after flying into deteriorating weather conditions, you elected to climb through the clouds and continue the flight towards Richmond instead of returning to VFR conditions in the Tri-City area. Operation of this nature is contrary to the Federal Aviation Regulations.

This letter is to inform you that this matter is under investigation by the Federal Aviation Administra-

tion. We would appreciate receiving any evidence or statements you might care to make regarding this matter within 10 days of receipt of this letter. Any discussion or written statements furnished by you will be given consideration in our investigation. If we do not hear from you within the specified time, our report will be processed without the benefit of your statement.

Yours truly,

G. R. Riley for
JOHN B. NEWELL
Manager, General Aviation District Office

BRON BURWELL, M.D.
JOHN GUILLERMIN, M.D.
1570 Brandon Avenue
Petersburg, Virginia 23803

February 2, 1983

Mr. John Newell
Mr. Leo Bohnke
General Aviation District Office
Byrd International Airport
Sandston, VA 23150

Re: AEA-GADO-1r:LDB

Dear Mr. Newell and Mr. Bohnke;

In response to your letter of January 27, 1983, let me clarify what I said to Mr. Bohnke during our brief phone conversation previously. From your letter, I understand your two concerns about my flight from Knoxville to Richmond Dec. 31, during which I inadvertently flew into clouds during the night, are: 1. that I possibly failed to obtain adequate preflight briefing 2. that once in the clouds and unable to establish radio communication with either Roanoke or Tri-Cities, that I exercised poor

judgment in proceeding southeast bound of the Roanoke TRSA, rather than returning southwest bound back over the mountains to Tri-Cities.

Concerning my preflight briefing, I believe it was adequate and probably excessive. I believe the Knoxville FSS log of briefing calls will show either four or five calls for aircraft 4682D, beginning late night Dec. 30 a few hours after I had arrived in Knoxville. Because I worked throughout the Christmas holidays, I planned a 12 hour late Christmas visit to my parents in Knoxville the evening of Dec. 30 and morning of Dec. 31st. My first briefing for the return flight TYS to RIC was Dec. 30 evening. The forecast was that Virginia east of Roanoke would be IFR, the day of the 31st. I therefore made a commercial reservation of Piedmont flight

288 from TRI to RIC departing TRI 4:10 pm local arriving RIC 7:14. I planned to leave the airplane tied down in TRI and return for it in VFR weather. The reason for not flying Knoxville to Richmond is that there are no commercial flights direct between the 2 cities, and one has to layover in either Atlanta or Charlotte. I made several calls to Knoxville FSS the morning of Dec. 31 to confirm that the flight from TYS to TRI would be under VFR conditions. I still have the notes from some of those briefings on the flight log forms I use:

TYS 2,500 SCT
TRI 25,000 SCT;
 forecasting 25,000 SCT
ROA 2,500 SCT, 3,500 OVC vis 10;
 forecasting 2,500 SCT through OIZ
RIC 800 OVC/variable/drizzle

I reconfirmed the briefing from Knoxville FSS by calling Newport News FSS long distance from Knoxville at 1:54 p.m. local.

When I am flying cross country out of state, after calling the local FSS, I always call Newport News FSS long distance. I have enclosed a xeroxed copy of my "C&P" bill for the 4 minute briefing I received for the TYS-TRI flight at 1:54, which was just prior to leaving my parents' home for McGhee Tyson Airport. I have been told that this practice is a waste of money, but I recognize the names and voices of the Newport News FSS men, and know by this means that the briefing is really adequate. On that briefing, I recall asking specifically if there were any PIREPS for the western part of Virginia (there weren't) and asking specifically about the area weather, and being told that the eastern part of the state was IFR and that North Carolina was also.

I made a final Knoxville FSS call after preflighting, and filed TYS-TRI. The notes

I have from that briefing are: TRI 4,000 SCT, 25,000 SCT. I was on the ground at the TRI-FBO at 4:20 local, having missed my Piedmont flight. I called the FSS at TRI and received an updated briefing for ROA, which my notes show as 2,500 SCT vis 10 temp 40, forecasting 2,500 SCT. I then called and made a reservation for Piedmont's flight 287 departing ROA at 7:10 local, arriving RIC 7:43. I had now revised my plans to leave the airplane tied down in Roanoke.

In summary, I believe I made thorough weather planning. I believe the reason that I got into clouds was a combination of the unavailability of weather information between the reporting points of TRI and ROA, and/or being unable to see the forecast scattered clouds until I was flying in them--due to night flight.

Regarding the second point in your letter as to why I did not return to VFR conditions by flying back to Tri-Cities, as I told Mr. Bohnke over the phone, the first thing I did do upon encountering clouds was to make a 180 degree standard rate turn. My heading at that time was 060, and I was at 3,200 with TRI altimeter setting. This was my assigned altitude from departure control at TRI and I had continued to maintain it. I was flying VFR following the lights of Interstate 81 North, cross checking my position using the Glade Springs and Pulaski VORs. I was not tracking towards a VOR, but following the interstate through the valley between the mountain ridges when I got into clouds. I believe I was just over Christianburg, Virginia at that time. When making a 180 degree turn and maintaining a heading of

240 did not get me out of the clouds, my immediate concern was not crashing into a mountain. I remembered the 3 C's: when in trouble, climb, confess, and comply. I climbed to 5,500, which got me above the clouds, and circled while trying to contact Roanoke. I tried all the Roanoke frequencies, including the tower, and then all the TRI frequencies, without result, although my radios were working normally. I then tried calling VPI unicom and also received no answer. I next tried tracking to VPI on 257 (which at the time I got into the clouds was on my left wing tip on the ADF) and was the nearest airport. Although I could occasionally see lights and breaks through the clouds, I could not find a safe area to descend through the clouds and was never able to see the VPI beacon. I then decided the best decision

was to fly south of the ROA TRSA, so as to stay out of the way of the mountain ridges south of Roanoke and out of the way of other aircraft, and to continue to try to reach Roanoke for help. This is what I did, maintaining 5,500 altitude, cross-checking my position using the Roanoke and BlueRidge VORs, and continuing to try to establish radio contact with Roanoke. I was southeast of Roanoke trying every tenable frequency in my ADF, when I picked up Richmond ATIS, reporting 1600 overcast 3 miles visibility. At that point I had reached the conclusion that Roanoke might be having radio trouble. I therefore gave up on Roanoke and decided I was going someplace I could get some help. I remained south of the Lynchburg CZ and RIC TRSA on the heading of 090. The rest of the story you know.

In summary, after my initial 180 degree turn back towards TRI failed, I didn't again even consider that option because I was afraid of flying back into mountainous terrain. My flight briefing had indicated that ROA was VFR and forecast to remain so. At the time, those were the best decisions I could make. On your tape of my landing in Richmond, there was a communication from a pilot flying from Richmond to Roanoke who offered to allow me to follow him to Roanoke. That pilot introduced himself to me at Byrd a week later, and mentioned that Roanoke had indeed been VFR when he landed the night of Dec. 31. In retrospect, had I tracked into Roanoke, rather than trying to stay south of the mountains and TRSA until establishing radio contact with Roanoke, I might have been able to reach Roanoke Approach and descend into VFR conditions there.

I hope this long letter has clarified the points that Mr. Bohnke and I did not discuss in detail. I still have my flight plans and charts from that trip, should you need them. I remain very grateful for the help that the Richmond controllers gave me that night and am heeding the advice that the Richmond controllers gave me on the ground--to get an instrument rating. To summarize the lessons I learned from this one cross country flight would consume as much paper as this letter.

I am sorry for the inconvenience I caused Mr. Hendricks and the Richmond controllers, and most appreciative of their help. I realize that in flying safety is paramount. I know that flight into IFR conditions--although inadvertent --was illegal, and hope that, given the details of this flight, you will realize

that I did my best to put safety first, keep a clear head, and fly the airplane.

I thank you very much for your time and effort, and am grateful for your consideration in this matter.

Sincerely,

Bron Burwell, M.D.

BB/mc
cc: Mr. Riley
Mr. Hendricks
Enclosures: 2

CERTIFICATE OF SERVICE

I, Robert P. Smith, attorney for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of October, 1986, I served copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

John M. Stuhldreher, General Counsel
Office of General Counsel
National Transportation Safety Board
800 Independence Avenue, S.W.
Washington, D.C. 20594

Vicki Leemon, Esq.
Federal Aviation Administration
Room 918C, AGC-250
800 Independence Avenue, S.W.
Washington, D.C. 20591

Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

Robert P. Smith
601 Broadway, Suite 400
Denver, Colorado 80203
(303) 292-3880
Attorney for Petitioner

AFFIDAVIT OF MAILING

I, Robert P. Smith, attorney for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of October, 1986, I deposited in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Robert P. Smith
601 Broadway, Suite 400
Denver, Colorado 80203
(303) 292-3880
Attorney for Petitioner

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN to before me at Denver, Colorado, this 8th day of October, 1986.

Linda S. Alexander
Notary Public
State of Colorado

My commission expires:
5-29-89